United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1169

TO BE ARGUED BY JOHN H. DOYLE, III

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B pgs

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DAVID LEE WILLIAMS, a/k/a "David Lattimore Williams," "Donald Fernandez," "Samuel Johnson," "Louis Jackson," "Darry L. Williams," and "Darry Larry Williams,"

Defendant-Appellant

On Appeal from the United States District Court, Southern District of New York

BRIEF OF DEFENDANT-APPELLANT

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THE ISSUE PRESENTED FOR REVIEW

Did the District Court abuse its discretion in declaring a mistrial sua sponte during the course of the opening statement by defendant's assigned counsel, on the asserted ground of the incompetency of defendant's counsel, after the Court had observed defendant's counsel conduct a hearing on behalf of defendant on the issue of defendant's competency to stand trial, and had thereafter permitted defendant's counsel to select the jury on behalf of defendant, and defendant's counsel had in fact conducted both the competency hearing and the opening statement in a perfectly normal and adequate fashion, with the result that any retrial of defendant on the same charges would be constitutionally impermissible under the double jeopardy clause of the Fifth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution of the United States:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . "

STATUTE INVOLVED

18 U.S.C. §4244:

> "Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. . . "

Statement of the Case

1. Nature of the Case

Defendant-appellant David Lee Williams ("defendant") appeals from an opinion and order entered on March 18, 1976 by United States District Judge Lloyd F. MacMahon denying defendant's motion to dismiss the indictment on the ground that defendant had already been put in jeopardy for the same offense.*

2. The Proceedings and Disposition Below

Indictment 75 Cr. 992 was filed on October 16, 1975, naming defendant in eight counts. Count One is a conspiracy count alleging a conspiracy to violate Section 1014 of Title 18, United States Code, by the making of false statements and reports to certain banks. The seven substantive counts each charge a specific false statement and report to a particular bank. Jose Sanchez, a co-defendant, was named in six of the counts including the conspiracy count. On November 24, 1975 the District Court held a hearing on the competency of defendant to stand trial and upon the conclusion of the hearing found the defendant to be competent. Trial commenced immediately thereafter. A jury was selected and was discharged during the opening statement by defense counsel. Defendant thereafter

* The appealability of this order was established by the Court in United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975)

moved for an order dismissing the indictment on the ground that defendant had already been put in jeopardy for the same offense. In an opinion and order entered on March 18, 1976 the District Court denied this motion.

Statement of Facts

1. The Offenses Charged in the Indictment

The indictment charged that beginning on March 18, 1975, defendant and Jose Sanchez entered into a conspiracy to make false statements and reports for the purpose of influencing the action of Manufacturers Hanover Trust Company and First National City Bank upon applications for loans and credit submitted to said banks by the defendants. The overt acts mentioned in the conspiracy count charge that defendant, on six occasions during the period from March 18, 1975 through July 10, 1975 submitted loan applications to certain banks containing false information as to defendant's real name. One overt act charged Jose Sanchez with the submission of one loan application in a false name. In Counts 2 through 8 defendant is charged with making seven specific false statements and reports as to his identity to Manufacturers Hanover Trust Company and one such false statement to First National City Bank.

2. The Competency Hearing

On November 24, 1975 the Court held a hearing on the competency of defendant to stand trial. Defendant was represented by counsel assigned under the Criminal Justice Act, 18 U. S. C. §3006A. Defendant's counsel called Dr. Norman Weiss, a qualified psychiatrist who had examined the defendant on October 6, 1975. Dr. Weiss testified that defendant was not competent to stand trial. (26a).* Dr. Weiss found that defendant was suffering from a chronic schizophrenic process. In 1964 defendant had been hospitalized in Rollman Hospital in Cincinnati where he received electro-shock treatments. (28a). Dr. Weiss noted that defendant had had a marginal ability to hold jobs and was marginal in his social relationships. Defendant had hallucinations and delusions, which the doctor characterized as a mental state of "active paranoid delusion." (28a).

The Court interrupted Dr. Weiss, commenting that he had not heard any questions directed to the competency of defendant to stand trial. Defense counsel then elicited testimony that the symptoms of the disease or defect were that defendant was compelled to act out and that the idea was of such a nature as to interfere with his proper judgment. (29a). The District Court asked Dr. Weiss what his understanding was of when a man is competent to stand trial. Dr.

* Reference to page numbers with the suffix "a" are to the Joint Appendix.

Weiss testified that there were two parts of it -- the defendant's understanding of the charge and his plea and of the system -- an opportunity for a jury trial, the role of the judge, the attorney, the prosecuting attorney and the defense attorney. (29a).

The Court then asked a series of questions which brought out that defendant had been able to communicate with Dr. Weiss. Defendant appeared to understand what Dr. Weiss was saying and he gave responsive answers although not necessarily cohesive, and there was a certain amount of confusion and lack of precision in defendant's answers (30a) -- his mind would tend to wander often. Defendant told Dr. Weiss that he was charged with falsifying statements for credit cards. (ibid)

Defense counsel then asked Dr. Weiss whether he had asked defendant if defendant had spoken to his attorneys and if defendant understood what his attorney had said to him in terms of the charges and the defense in the trial, to which Dr. Weiss responded in the affirmative. (31a). Dr. Weiss stated that defendant had a grasp of reality in terms of the setting around him and the proposed trial but not as to other issues. For instance, defendant for many years had maintained an idea that the hospital where he was institutionalized had destroyed his mind. Defendant equated the shock treatments with electrocution and had the idea that he was going to gain financial retribution from the Government. The alleged

crime was a way of getting back at the Government for what he felt he had suffered at their hands ten years ago. Defendant was confused in that he was holding a Government agency responsible for his situation, that had occurred medically ten years previously. (32a). Dr. Weiss had the impression that defendant could not understand the reality or the distinctions between the Government on the one hand and the hospital on the other nor did he understand the distinctions between electricity as used in treatment and electricity as used in electrocution. At the time of Dr. Weiss' examination the defendant continued to maintain these delusional ideas of getting even with the Government. Dr. Weiss opined that the delusion impaired his ability to participate in his defense. (32a).

The Court then asked further questions, developing that defendant could communicate with his lawyer, that he knew what he did at or about the time he was accused of doing it, that he knows whether or not he did it and he knows who was present if anyone at the time, he knows when and how he did it and what he did and explained to the doctor that he did it to get back at the Government. (32a-33a).

The Government called Dr. Annaliese Alma Pontius. Dr. Pontius testified that it was her opinion that defendant was capable of understanding the charges against him, and that he was able to assist in his own defense. The basis

for this opinion was her conclusion that defendant was without psychosis. Further, Dr. Pontius found that defendant did not suffer from any hallucinations. Specifically, Dr. Pontius believed that defendant recognized that various voices and images he was aware of were his own thoughts. Dr. Pontius found that defendant did not have difficulty holding things in his mind and operating on them and that defendant did not suffer from any psychomotor retardation. (35a-38a).

On cross-examination, defense counsel brought out that Dr. Pontius had determined that defendant had a schizoid personality, meaning that defendant was a lonely person and had an impoverishment of human relationships, although his reality testing was intact. (38a). Defendant had no "formal" thought disturbances. Defense counsel brought out that Dr. Pontius was in disagreement with the diagnosis of Rollman Hospital because in her view the diagnosis was not supported by sufficient facts. Specifically, Dr. Pontius felt that there was no hard evidence that defendant suffered from hallucinations. For a real hallucination, the psychiatrist has to make a statement that the patient turned around, acted surprised or acted frightened or made certain movements as if they were real. There were none of these reports in the file. (41a). Dr. Pontius asked defendant if he "turned around" and he said he had not since early childhood. Ever since

then, he knew that these were his own images. He did not call the police or offer the "images" any food or drink. Defense counsel brought out that the effect of electro-shock treatments would have the effect for about eight to nine months of dulling defendant's memory. (42a). Defendant gave Dr. Pontius his recent past and had no gross lapses of memory. He said that on certain days he was somewhat vague but this was within "normal limits." Defendant said that his mother is alive and his father died when he was a child. (44a). Defense counsel brought out the fact that defendant's mother had actually died in 1959, to which Dr. Pontius responded that such an answer might have an emotional reason but if there were other memory lapses, organic brain damage might be indicated. Defense counsel asked whether defendant's mother's death in 1959 and defendant's later receiving some 20 to 25 electro-shock treatments, might indicate organic brain damage. Dr. Pontius said that other signs would be needed to suggest such a diagnosis. Dr. Pontius testified that defendant told her that he signed loan applications, that he worked for the City for three or four years and made $18,000 per year. (45a).

Defense counsel brought out that defendant had joined a drug program. The Court interrupted defense counsel and stated that the issue was whether defendant understands the nature of the charges and is able to communicate and cooperate

in his defense. (47a). Defense counsel pointed out that inconsistencies in defendant's statements were a sign of his lack of a sense of reality. The Court then brought out that a schizophrenic may be able to cooperate with his counsel and to understand the nature of the charges. Defense counsel elicited testimony that defendant had said that as a childhood experience he saw a young man being electrocuted by a live wire and that defendant connected that with the electro-shock therapy. Defendant listened intently to the psychiatrist and did not continue to maintain that delusional belief. It is also not a bizarre type of connection to make. (48a).

On redirect examination the Government brought out that defendant had stopped insisting that electrocution and electro-shock treatment were the same and that that act of desisting was not behavior characteristic of a schizophrenic. The statement meant rather that it was simply consistent with current beliefs. The following colloquy then occurred:

"RECROSS-EXAMINATION

BY MR. GUTTMAN:

Q Then what is that behavior consistent with?

A Consistent with culturally-supported belief that is supported by the press at the present time, having all kinds of statements made in the press, what electroshock treatment could do to a brain and it is a belief that is

quite prevalent at the present time supported through the press in the general public that electroshock does harm to the brain.

Q When was the last time you read in the newspapers anything about electroshock therapy?

MR. BENTLEY: Objection.

THE COURT: Sustained

MR. GUTTMAN: The doctor is saying --

THE COURT: Sustained.

Q When was the last time you read about electroshock therapy discussed in the newspapers?

A I read it in the medical magazines.

MR. BENTLEY: Objection.

THE COURT: Sustained.

A He told me himself --

MR. BENTLEY: There is an objection sustained to this line of questioning.

Your questions are not directed to the issue. They are argumentative, bad in form. They are horrible". (49a-50a).

Defense counsel then established that defendant said that he had been born with a veil over his head, resulting in his being able to see things that other persons do not see. (50a).

3. The Trial

The Court found the defendant competent to stand trial. A jury was selected immediately thereafter. In the Government's opening statement, the Assistant United States Attorney outlined the nature of the Government's proof and also

anticipated a defense of lack of criminal responsibility, which he characterized as "as bogus as the loan applications themselves, an attempt to escape responsibility for a carefully planned and premeditated criminal conspiracy and a series of criminal acts." (57a, 58a).

In defense counsel's opening statement he attempted to explain to the jury that the Government has the burden of proving the elements of the crime beyond a reasonable doubt but was interrupted in that line of comment by the Court. The Court instructed defense counsel to "leave the law to the Court." (60a). Defense counsel then attempted to explain to the jury that it would not have to reach the question of criminal responsibility if the Government does not meet its burden, at which point the Court again interrupted him and instructed him to say what he intended to prove and not what the law is. (61a). Defense counsel went on to tell the jury taht he would call witnesses who would testify as to the defendant's mental defects and lack of legal responsibility for his actions. He then pointed out that there is a presumption of innocence at which point the Court stated as follows:

> "Please, Mr. Guttman. Would you like to put this robe on? I am sorry, I must declare a mistrial. This defendant is not competently represented." (62a)

4. The Opinion of the District Court

Judge MacMahon observed that it appeared that neither the defense witness nor defense counsel at the competency hearing was aware of what facts were material to the issue of competency to stand trial. Defense counsel did not seem to know what questions to ask nor how to ask them and the witness, manifestly without legal guidance, was almost totally unprepared to testify. As a result, the Court was compelled to take over the examination of defense witnesses on direct and of the Government psychiatrist on cross. (11a-12a). Judge MacMahon further noted that during the first few minutes of the opening statement, the Court was obliged to interrupt and warn defense counsel three times not to instruct the jury on the law. After defense counsel had failed to heed the Court's advice it was left with no choice but to conclude that counsel was either unwilling or unable to make a distinction between questions of law and issues of fact. The District Court commented that the issues raised in the case were serious and difficult and were further complicated by an insanity defense. When such a defense is interposed on non-frivolous grounds as was plainly the case here the Court had a special duty to protect the defendant from a miscarriage of justice. The District Court stressed the obligation that it perceived to assure that assigned counsel in a criminal case receive experienced and

adequate representation. The District Court found that it had a duty to intervene when the quality of representation falls below the level necessary to achieve some semblance of the adversary process so essential to focusing issues of fact. (16a). Further, the Court felt that there would be substantial harm if because of the double jeopardy clause a court felt compelled to allow a trial to continue although the accused was not adequately represented.

> "It would be inconceivable to require a trial judge to rely on the chance that a cold record will shock the conscience of an appellate court when an incipient miscarriage of justice is growing before his eyes." (16a).

The Court rejected the suggestion that a continuance would have been possible on the ground that it would have been difficult to find substitute counsel,and to have given him sufficient time to prepare and schedule the resumption of trial admidst a conjested calendar and at a time when the original jury and alternates could return. (18a).

Argument

> THE DISTRICT COURT ABUSED ITS DISCRETION IN DECLARING A MISTRIAL ON ITS OWN MOTION. ACCORDINGLY THE INDICTMENT MUST BE DISMISSED BECAUSE DEFENDANT HAS ALREADY BEEN PUT IN JEOPARDY FOR THE SAME OFFENSE.

1. Defense Counsel Competently Represented the Defendant

The District Court overreacted to an extreme degree in declaring a mistrial on the basis of the performance of

defense counsel. A careful reading of the record demonstrates that defense counsel was furnishing adequate representation of his client.

a. The Competency Hearing

Defense counsel was successful in bringing out a number of important facts relating to the serious issue of defendant's competency to stand trial. The District Court's impression of lack of preparation on the part of defense counsel was illusory. Through Dr. Weiss, defense counsel established defendant's prior hospitalization for electro-shock treatments and the existence of an active paranoid delusion. When Dr. Weiss was asked by the Court to state his understanding of the legal test of competency to stand trial, he correctly stated the first part of the test, i.e., defendant's ability to understanding the proceedings, and clearly had not completed the answer. It is clear that Dr. Weiss understood the second branch of the test from his later testimony that defendant had an impaired ability to participate in his defense (32a) See 18 U.S.C. §4244.

Moreover, defense counsel brought out the following important points in the course of his examination of the experts:

(i) Direct Examination of Dr. Weiss

Defendant's active paranoid delusion was of such a nature as to interfere with his proper judgment. (29a).

Defendant had the idea that his mind had been destroyed at the hospital where he was institutionalized. (31a)

Defendant equated the ock treatments he had received with electrocution. (31a).

Defendant had the idea over many years that he was going to gain financial retribution from the Government to get back at the Government for what he felt he had suffered at their hands. (31a).

Defendant could not understand the reality of the distinction between Government agencies and the circumstances that led to his disturbed mental state. (31a).

Defendant could not understand the distinction between electricity and electrocution. (32a).

(ii) Cross-Examination of Dr. Pontius

Defendant had a schizoid personality. (38a).

Dr. Pontius disagreed with the diagnosis made in 1964 by Rollman Hospital on the question of whether defendant had hallucinations. (39a-40a).

The effect of electro-shock treatments would dull the memory for about eight to nine months. (41a-42a).

Defendant incorrectly told Dr. Pontius that his mother was alive whereas in fact she had died in 1959. Such a statement could reflect organic brain damage if there were other memory lapses. (44a).

Defendant had joined a drug program. (45a).

Defendant had seen a young man being electrocuted by a live wire and connected that observation with his electro-shock therapy. (47a).

Defendant said that he had been born with a veil over his head that made him see things that other persons do not see. (50a).

While Judge MacMahon appears to have been correct in sustaining objections as to form relating to the testimony of Dr. Pontius regarding the beliefs of the general public about electro-shock therapy, it is difficult to conclude that defense counsel was doing anything other than trying to make the point that defendant may not have read anything or heard anything in the media about electro-shock therapy. (supra, p. 8-9)(49a-50a)

From the foregoing it is clear that defense counsel was properly discharging his obligation to his client and to the Court in pressing the competency issue and in developing numerous important facts which had a bearing on that issue. When there is reasonable ground to believe that a defendant is not competent to stand trial, the Court has an affirmative obligation to conduct a hearing and to satisfy itself from all available evidence that the defendant is in fact competent. 18 U.S.C. §4244; United States v. David, 511 F.2d 355, 360 Note 9 (D.C. Cir. 1975). As the Court stated in United States v. Knohl, 379 F.2d 427 (2nd Cir.) cert. denied 389 U.S. 973 (1967):

> " . . . §4244 may be invoked by the accused or by anyone on his behalf, and a duty rests upon both the prosecution and the court to comply with it, once it has come to their attention that there is reasonable ground to believe that the accused is mentally competent to the degree described in the statute."

Because Dr. Weiss believed that defendant's paranoid delusion impaired his ability to participate in his defense, there was substantial evidence of incompetency and a serious issue was presented. Judge MacMahon's opinion excoriating the conduct of trial counsel incorrectly belittles the knowledge and preparation of Dr. Weiss and ignores the fact that defense counsel elicited significant probative material tending to show defendant's incompetency. On the entire record of the hearing we submit that defense counsel had fully discharged his responsibilities to his client and to the Court.

b. The Opening Statement

Judge MacMahon was justified neither in repeatedly interrupting defense counsel's opening statement nor in declaring a mistrial. Defense counsel was using a form of opening statement which is widely recognized as perfectly proper: the avoidance of making specific factual representations to the jury and reliance upon the procedural rules favoring the defendant: the Government's burden of proof, the presumption of innocence, the requirement of proof beyond a reasonable doubt and the Government's burden of proving the defendant's criminal reponsibility.

In Polstein, Defending Minor Felony Cases, 13 Am. Jur. Trials 534, 535 (1967) the author states as follows:

"Aside from legal technicalities as to the quantum of proof, Peters [a hypothetical defendant] really has no defense. If the trial is in a court where the defense opens immediately after the prosecutor's introductory remarks, Peter's attorney should make a very brief opening statement stressing that the defendant is clothed with the presumption of innocence throughout the proceedings, that the burden is on the prosecution to overcome that presumption and to prove every element of the charge beyond a reasonable doubt, that the indictment is only an accusation and not evidence, that the district attorney's statements do not constitute proof, that the only evidence to be considered is that which comes from the witness stand, and that a defendant who desires to rest on the insufficiency of the prosecution's case is under no obligation to present any evidence."

In American College of Trial Lawyers National Defender Project and ALI-ABA Joint Committee on Continuing Legal Education, Trial Manual for the Defense of Criminal Cases,* Vol. 2, p. 2-312 (2nd Ed. 1971) the authors state as follows:

"The obvious problem is that an opening speech may commit the defense to a certain tack that it may later find embarrassing. On the other hand, counsel may want to use an opening speech to offset the psychological effect upon the jury of hearing only the prosecutor's side of the case at the outset. An opening statement can be framed that does not commit the defense to any particular line of proof or theory, but focuses on the prosecutor's burden of proof, the evidentiary confines within which it must prove its case, the gravity of what is at stake for the defendant at the trial, and the weighty responsibility of the jurors in deciding the fate of a fellow man; and that thanks the jurors in advance for their serious and impartial consideration of the case."

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* Prof. Anthony G. Amsterdam is the Reporter for the ALI-ABA manual; Bernard L. Segal and Martin K. Miller are the Associate Reporters.

In Cipes and Bernstein, Criminal Defense Techniques, Vol. 1a ¶22.03[2] (1969) the authors state as follows:

> "Almost any opening statement will contain certain common elements and theories that are basic to the defense. The jury must understand these and apply them favorably to your client if you are to win your case."

The authors identify four "common elements" that will typically be contained in an opening statement -- reasonable doubt, burden of proof, meaning of an indictment and presumption of innocence. ibid.

Thus it is obvious that defense counsel chose to make a form of opening statement which is acceptable and recommended by leading authorities on trial practice.

The handling of the case by defense counsel more than amply satisfied the test of competency of counsel enunciated in this Court:

> "The rule by which these instances of alleged incompetence is to be measured is that 'lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice'. United States v. Wight, 176 F.2d 376, 379 (2 Cir. 1949), cert. den., 338 U.S. 950, 70 S. Ct. 478, 94 L.Ed. 586 (1950)." United States v. Badalamente, 507 F.2d 12, 21 (2nd Cir. 1974), cert. denied, 421 U.S. 911 (1975).

2. The Trial Court's Declaration of a Mistrial Was an Abuse of Discretion and Requires Dismissal of the Indictment

The Fifth Amendment to the Constitution of the United States states in pertinent part as follows:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . "

The purpose of the double jeopardy provision of the Fifth Amendment was described by the Supreme Court in United States v. Dinitz, 44 U.S.L.W. 4309, 4311 (March 8, 1976) as follows:

> "The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense. See United States v. Wilson, 420 U.S. 332, 343; North Carolina v. Pearce, 395 U.S. 711, 717. Underlying this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' Green v. United States, 355 U.S. 184, 187-188. Where, as here, a mistrial has been declared, the defendant's 'valued right to have his trial completed by a particular tribunal' is also implicated. Wade v. Hunter, 336 U.S. 684, 689; United States v. Jorn, 400 U.S. 470, 484-485 (plurality opinion); Downum v. United States, 372 U.S. 734, 736." (emphasis added)

The Supreme Court has held that a retrial on the same charges after a mistrial declared sua sponte by the Court is consistent with the double jeopardy clause only if the District

Court's action was grounded upon 'manifest necessity". See United States v. Perez, 9 Wheat. 579 (1824). Thus, in a case where the District Court perceived clear prejudice to the defendant resulting from the prosecutor's line of inquiry, the Supreme Court held that the District Court properly declared a mistrial on its own motion and that defendant could be retried. Gori v. United States, 367 U.S. 364 (1961). On the other hand, where the action of the District Court in aborting the trial was "erratic", the Supreme Court held that the defendant could not be tried again on the same charge. United States v. Jorn, 400 U.S. 470 483, 484 (1971).* Mr. Justice Harlan, writing for a plurality of four justices in Jorn, rejected a proposed test which would make the outcome turn on whether the defendant benefited from the mistrial ruling or whether the judge intended the ruling to benefit the defendant. United States v. Jorn, supra, 400 U.S. at 483. Hence the fact that the trial Court in the case at bar acted to benefit defendant does not foreclose inquiry into the double jeopardy issue -- the action must have been grounded upon manifest necessity justifying the deprivation of defendant's "valued right" to secure a verdict from the jury he had participated in selecting.

* The term "erratic" was used by Mr. Justice Rehnquist to describe the lower court's action in Jorn. See Illinois v. Somerville, 410 U.S. 458, 469 (1971). In Jorn the District Court had declared a mistrial after it was brought out that the first five Government witnesses had been interviewed by the Internal Revenue Service without having received warnings of their constitutional rights.

Judge MacMahon's action in this case did not meet the requirement of manifest necessity because defense counsel was representing defendant competently. The Court's action was "erratic" and constituted an abuse of discretion. See United States v. Gentile, 525 F.2d 252 (2nd Cir. 1975), where this Court recognized that the decisions in Gori. Jorn and Somerville resulted in a "composite standard of lack of abuse of discretion . . . and benefit to the defendant as the sole motivation." id at 257. Because there was an abuse of discretion by the trial Court, Gentile stands for the proposition that defendant cannot be tried again on these charges.

The facts in this case are to be distinguished from the facts in cases where it has become perfectly apparent to the trial judge that if the trial is carried to a conclusion favorable to the Government, the conviction would have to be overturned and a new trial granted. This was the case in Illinois v. Somerville, supra, where the indictment was discovered to be defective at an early stage in the trial and the Supreme Court approved the granting of a mistrial on the prosecutor's motion.

This case should also be distinguished from situations in which the conduct precipitating a mistrial is patently outrageous, resulting in irreparable prejudice to either party. This was the case in United States v. Dinitz, supra,

where the defendant's lead counsel represented facts in his opening statement for which he knew there was no basis. Thus the reliance of Judge MacMahon on Dinitz is misplaced, as the conduct of counsel in the case at bar was in fact entirely proper and competent. Moreover, the defendant in Dinitz explicitly requested a mistrial through his other attorney who remained in the case after his lead counsel was expelled.

In the case at bar there was no substantial reason to believe that defendant's representation would not have been wholly adequate and the District Court thus erroneously deprived defendant of his "valued right . . . to have his trial completed by the tribunal summoned to sit in judgment on him." Downum v. United States, 372 U.S. 734, 736 (1963).

The trial Court should have permitted defense counsel to complete his opening statement and then proceeded with the taking of evidence. Such a course of action would have assured that defendant would not be deprived of his right to obtain a verdict in the trial which had commenced. If the case went forward to a verdict of acquittal, defendant would in no sense have been prejudiced by any deficiencies in the manner in which his case would have been tried. If the jury returned a verdict of guilty or were unable to agree, the Court would have been able to afford defendant a new trial. In any event, there would have been a definitive

record on which to decide the question of whether defendant had been adequately represented. The precipitate action taken by the trial court was patently unjustified on the present record.

CONCLUSION

The Order of the District Court entered on March 18, 1976, should be set aside and the case remanded to the District Court with instructions that the indictment be dismissed.

Respectfully submitted,

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